FILE COPY

Office Supreme Court, U.
FILED
JUL 15 1932
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

Term Number 176

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,

APPELLANT,

Versus

ROY C. WALLACE, COMPTROLLER, ET AL.,

APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF TENNESSEE.

STATEMENT BY APPELLANT TO COMPLY WITH RULE TWELVE OF THE SUPREME COURT OF THE UNITED STATES.

FITZGERALD HALL,
Counsel for Appellant.

SETH M. WALKER,
FRANK SLEMONS,
WALTON WHITWELL,
W. A. MILLER,
Of Counsel.

July 20, 1932.

(File No. 36,873.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

Term Number 176

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,

APPELLANT,

Versus

ROY C. WALLACE, COMPTROLLER, ET AL.,

APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF TENNESSEE.

STATEMENT BY APPELLANT TO COMPLY WITH RULE TWELVE OF THE SUPREME COURT OF THE UNITED STATES.

MAY IT PLEASE THE COURT:

Chapter 58 of the 1923 Acts of Tennessee undertook to finance "the construction and maintenance of a highway system in the State" by "requiring all . . . . corporations *engaged in or carrying on*

the business[1] in this State of *selling* gasoline. . . ." to pay a *privilege tax* for the doing of such gasoline business. (R., 30-31)[2]

Chapter 67 of the 1925 Acts of Tennessee amended said Act of 1923 so as to embrace those "engaged in or carrying on the business" not only of selling but also of "*storing or distributing*" gasoline. (R., 31-32)

Appellant Railway was chartered as a common carrier by railroad and may not engage and does not engage in any other business—specifically it is not in the gasoline business. (R., 28, 33-34)

The State of Tennessee undertook to collect from appellant Railway taxes under the 1923 and 1925 Acts just mentioned on the theory that because it bought (outside of Tennessee) gasoline, kept it a few days on its premises awaiting consumption by it in normal railroad operation, it was "engaged in or carrying on" the gasoline business. (R., 30)

Thereupon appellant Railway filed a bill in the chancery court of Davidson County, Tennessee, to have said Acts construed and, if held applicable to it, their validity under the Federal Constitution determined. (R., 26-47)

The bill specifically alleged that the Railway was chartered to engage only in the business of operat-

---

[1]All italics ours.

[2]Record references are to original record filed in this Court before printing.

ing a railroad—and in fact was engaged and could engage in no other; that it bought gasoline outside Tennessee which was delivered to it at its Nashville shops in quantities for some thirty days' use and that all of it was used promptly exclusively on the Railway's own property (as distinguished from the use of public roads) in the normal operation of its interstate railroad, over forty per cent being used in states other than Tennessee; that it was no more "engaged in or carrying on" the gasoline business than it was engaged in the tie, lumber, coal, steel, water or other business; that the tax in question was not a property tax, nor a tax on sales or use, nor involved the exercise of the police power, *but was a tax for the privilege of engaging in a business in which it did not and could not legally engage;* and, finally, that to attempt to segregate the infinite number of activities making up interstate commerce by railroad and denominate the doing of each the "carrying on" of a separate and distinct business and impose a separate and distinct privilege tax thereon was a direct and illegal burden on interstate commerce; and that, if the tax could be construed to be on the use (it was held otherwise), then to tax the use of fuel in interstate railroad operation (as distinguished from use by a "local enterprise" or the use of the public highways) was likewise an illegal burden on interstate commerce. (R., 33-37)

The bill further set out Tennessee's tax system (of which the Acts in question are an integral

part) applicable to railroads and its tax system applicable to their competitors, common carriers by motor vehicle on the public roads; and showed in detail that the actual application of the two systems operated to burden railroads some four hundred per cent more, considering all elements, than competing common carriers by bus and truck, thus not only directly burdening interstate commerce by railroad but violating the "due process" and "equality" clauses of the fourteenth amendment to the Federal Constitution. (R., 37-44)

A demurrer was filed, sustained, and the bill dismissed. (R., 58-65) On account of the constitutional questions involved the case was appealed directly to the Supreme Court of Tennessee. (R., 65)

The assignment of errors in the Supreme Court of Tennessee specifically challenged, as did the original bill above referred to, the validity of these state statutes under the "commerce," "due process," and "equality" clauses of the Federal Constitution. (R., 14-15) The Supreme Court in its original opinion of April 30, 1932, affirmed the lower court, basing its decision exclusively on the recent case of American Airways, Inc. v. Roy C. Wallace, Comptroller, 57 Fed. (2d), 877, (R., 16-17), which court said in part:

> "The statute in question does not impose a property tax upon the gasoline, but it imposes an 'excise' or 'privilege' tax upon the business

of storing and withdrawing the gasoline and the amount is computed upon withdrawals.

. . . .

"The Tennessee statute imposes an excise or privilege tax upon the business of storing and distributing gasoline, and this tax accrues whether the gasoline is used in interstate commerce or otherwise. . . . .

"It is simply a privilege tax upon engaging in a business within the state, and applies to all persons, firms or corporations doing a like business."

On May 4, 1932, appellant Railway filed a petition for a rehearing, on two grounds; first, that the court had not passed at all upon the discrimination claimed between Tennessee's taxing system of common carriers by railroad and common carriers by bus and truck, a question which had not been raised, discussed, considered or decided in said *American Airways, Inc.* v. *Roy C. Wallace, supra;* second, that the court had not specifically decided whether the challenged tax applied only to gasoline *used in Tennessee* or also to that *used in other states.* (R., 19-22)

The petition to rehear was denied on June 4, 1932, the court holding that the proposed tax applied on all gasoline used by the Railway in all states if it passed through its Nashville, Tennessee, shops, and disposed of the other constitutional questions by simply saying:

"The tax imposed upon those storing gasoline applies to all alike. The statutes made no

discrimination and it does not therefore contravene the provisions of the Fourteenth Amendment." (R., 24)

So all the federal questions presented to the Supreme Court of Tennessee were decided against appellant; the State statutes under attack were held valid; and a final judgment rendered against the Railway on June 4, 1932. (R., 25)

I

The judgment now sought to be reversed was a final one by the highest court of the State of Tennessee. The validity of the Tennessee statutes involved was directly challenged both in the lower court and in the Supreme Court of Tennessee on the ground that they violated the "commerce," "due process," and "equality" clauses of the Federal Constitution. (R., 14-15, 39-44) These constitutional questions were all decided by the Supreme Court of Tennessee against appellant's contentions, and said statutes were held valid. (R., 16-17, 23-24)

The jurisdiction of this Court is claimed under section 237(a) of the Judicial Code as amended by the Act of February 13, 1925.

The following cases sustain the right to review, formerly by writ of error, now (since the Act of January 31, 1928, as amended by the Act of April 26, 1928) by appeal:

Western & Atlantic Railroad v. *Henderson*, 279 U. S., 639.
Nashville, Chattanooga & St. L. Ry. v. *White*, 278 U. S. 456.
Sultan Railway & Timber Co. v. *Department of Labor*, 277 U. S., 135.

II

The final decision of the Tennessee Supreme Court was rendered and final judgment entered June 4, 1932. (R., 25) The Chief Justice of the Tennessee Supreme Court allowed the appeal and approved and signed all necessary orders and papers on June 21, 1932. (R., 4-13) The case was docketed in this Court on June 24, 1932.

III

The Tennessee statutes under attack, as construed by the Supreme Court of Tennessee, impose upon appellant Railway a tax on the theory that said Railway is "engaged in or carrying on the business in this State of selling or storing or distributing gasoline. . . . . ."

The tax in question is not a property tax—it is not a tax on sales—it is not a tax on the use or consumption of property—it is not an inspection fee—it does not involve an exercise of the police power. It is, purely and simply, a tax imposed on persons, firms, and corporations for the privilege

of doing in Tennessee a gasoline business. *Foster & Creighton Co.* v. *Graham*, 154 Tenn., 412; *American Airways, Inc.*, v. *Wallace*, 57 Fed. (2d), 877, 880-882.

The questions involved are entirely different from those considered by this Court in *Eastern Air Transport, Inc.*, v. *South Carolina Tax Commission*, 285 U. S. 147. In that case the tax sustained was on a sale made within the State of South Carolina by an oil company (which did not complain) to the Eastern Air Transport, Inc., which later used the gasoline involved in interstate commerce. *Here the tax is neither on the sale nor on the use*, but on the doing of a business which appellant does not, and cannot legally, do.

It differs from *East Ohio Gas Company* v. *Tax Commission of Ohio*, 283 U. S., 465, in that the tax there involved was for the privilege of carrying on a specified intrastate business *which the taxpayer was doing*. Here the only business appellant Railway carries on, and may legally carry on under its charter, is the operation of an interstate railroad.

Gregg Dyeing Co. v. *Query*, 52 Sup. Ct., 631, 285 U. S., ——, is entirely different in that the South Carolina statute there under attack applied only to gasoline actually used within the State in "local enterprises"; this court saying: *"There is an exception in the case of a tax directly on use in inter-*

state transportation"; whereas the Tennessee Acts in question are construed to apply to gasoline not only actually used in other States but also to gasoline used in interstate railroad operation.

The original bill in the trial court and the assignment of errors in the Supreme Court of Tennessee specifically challenged the validity of these Tennessee statutes on the ground that they violated the "commerce clause" of the Federal Constitution. (R., 43) The Supreme Court of Tennessee held otherwise. (R., 16-17) We find no case involving exactly this narrow question, though the principles announced in *Helson & Randolph* v. *Kentucky*, 279 U. S., 245, seem more nearly applicable than those enumerated in any other case.

The original bill in the trial court and the assignment of errors in the Supreme Court of Tennessee raised another and wholly different question, namely, that Tennessee's system of taxing railroads was, considering all elements, so disproportionate to the system in effect applicable to common carriers by bus and truck as to render the statutes under attack invalid under the "due process" and "equality" clauses of the Fourteenth Amendment. (R., 39-44) The Supreme Court of Tennessee decided against appellant on this proposition, with practically no comment, (R., 24), apparently on the theory that any such question of discrimination must be limited to the "four corners" of the statutes under attack rather

than to the tax system as a whole. This court held otherwise in *Gregg Dyeing Co.* v. *Query*, 52 Sup. Ct., 631, 634, 285 U. S. ——.

So far as we can find, this important question has not been before this court.

IV

These constitutional questions were specifically raised in the original bill below as the basis for the alleged invalidity of the State acts under attack, and were overruled by the trial court. (R., 39-44, 64-65) They were raised in the Supreme Court of Tennessee and overruled by that court. (R., 14-17, 23-24) They have been again raised by proper assignment of errors in this Court. (R., 5-8)

So far as jurisdiction and practice are concerned the case certainly seems to be properly here.

Whitney v. *California*, 274 U. S., 357, 360.
Fiske v. *Kansas*, 274 U. S., 380, 385.
Mellon v. *O'Neil*, 275 U. S., 212.
Silver v. *Silver*, 280 U. S., 117.
Klein v. *Board of Tax Supervisors of Jefferson County, Kentucky*, 282 U. S., 19.

It is respectfully submitted that this Court has jurisdiction of this cause on appeal.

The questions involved are new and of vast practical importance. A brief discussing these questions on their merits will be filed later.

A copy of this statement has been served upon adversary counsel and proof of such service filed with the Clerk of this Court.

Respectfully submitted,

Fitzgerald Hall

Counsel for Appellant.

July 20, 1932.

SETH M. WALKER,
FRANK SLEMONS,
WALTON WHITWELL,
W. A. MILLER,
Of Counsel.